

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

76-4257

To be argued by
THOMAS H. BELOTE

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-4257

YI CHUN CHENG,

Petitioner,

—against—

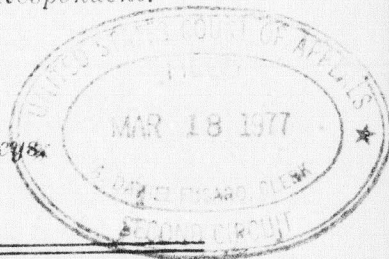
IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

BRIEF AND ADDENDUM FOR RESPONDENT

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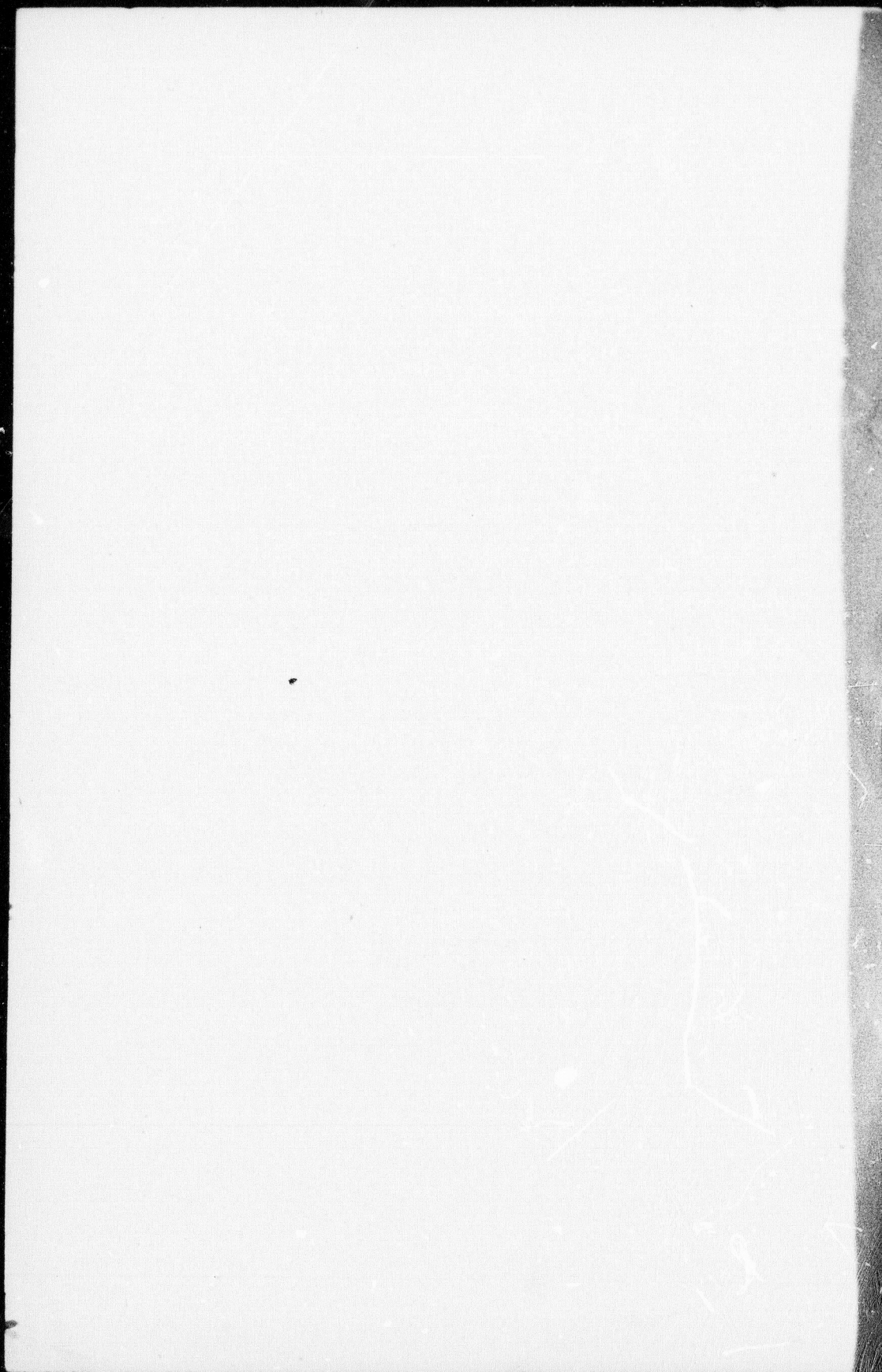


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-4257

YI CHUN CHENG,

Petitioner,

—against—

IMMIGRATION AND NATURALIZATION SERVICE,
Respondent.

BRIEF AND ADDENDUM FOR RESPONDENT

Issues Presented

1. Whether this Court has jurisdiction to review the denial of a stay of deportation.
2. Whether the order of the Board of Immigration Appeals, denying petitioner's motion for reconsideration, was an abuse of discretion.

Statement of the Case

Pursuant to Section 106(a) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1105a(a), petitioner Yi Chun Cheng ("Cheng") petitions this Court to review two final orders entered by the Board of Immigration Appeals ("Board") on November 23, 1976 and January

19, 1977 * respectively. The Board's first order denied Cheng's motion for a stay of deportation until the Board could adjudicate his most recent motion to reconsider, filed on November 18, 1976 (AR 4).** See 8 C.F.R. §§ 3.8. The Board's second order (See Addendum) denied Cheng's motion to reconsider. In that motion Cheng requested the Board to reconsider its September 9, 1976 dismissal of his appeal from the order entered by Immigration Judge Alexander Schonfeld on July 20, 1976. Judge Schonfeld's order had denied Cheng's original motion to reopen his deportation hearing to apply for the discretionary relief of suspension of deportation, see Section 244(a) of the Act, 8 U.S.C. § 1254(a), or, in the alternative, for the discretionary privilege of voluntary departure.*** It is the Immigration and Naturalization Service's (the "Service") position that this motion for review should be dismissed because: (1) this Court lacks jurisdiction to review the Board's denial of a stay of deportation; and (2) the Board's denial of Cheng's motion for reconsideration was proper.

* Cheng never submitted a motion to this Court requesting an amendment of his initial petition for review to include the January 19, 1977 decision. Instead he merely forwarded a letter to the Court asking that both the Board's orders be considered in the same appeal. In light of the insubstantial nature of Cheng's contentions with respect to these orders, the respondent will not object to their consideration so this will avoid delay and enable it to enforce the Board's original order without unnecessary delay.

** References preceded by the letters "AR" refer to the certified administrative record previously filed with this Court.

*** See Section 244(e) of the Act, 8 U.S.C. § 1254(e), and 8 U.S.C. § 244. This relief can be granted if the alien establishes that he is willing and has the immediate means with which to depart promptly from the United States. If granted it removes the stigma of an order of deportation from the alien's record and thus facilitates any future lawful re-entry into this country which he might wish to make. See Section 212(a)(17) of the Act, 8 U.S.C. § 1182(a) 17.

Statement of the Facts

The petitioner, Yi Chun Cheng, is a 27 year old native of China who was admitted to the United States at New York, New York on February 1, 1969 as a nonimmigrant in transit on his way to Caracas, Venezuela. See Section 101(a)(15)(C) of the Act, 8 U.S.C. 1101(a)(15)(C). However, after Cheng's airplane landed in New York, he failed to transfer to his flight to Venezuela and proceeded to New York City (AR 86). Within three days (AR 88) he obtained work as a kitchen helper (AR 91) and living accommodations in a restaurant in Millburn, New Jersey.

On July 1, 1969, Cheng was taken into custody by agents of the Service, and a warrant for his arrest was served on him (AR 95). Thereupon the Service commenced deportation proceedings against Cheng by issuing and serving him with an Order to Show Cause and Notice of Hearing (AR 94). In this order the Service charged Cheng with violating Section 241(a)(2) of the Act, 8 U.S.C. 1251(a)(2), by remaining in this country in violation of the conditions of his entry.

On July 11, 1969 Cheng's deportation hearing was held before Judge William Taffet at the Service's Newark Office (AR 81). Cheng was represented at this hearing by an attorney (AR 82). In his presence and under oath, Cheng conceded the truth of all the allegations contained in the Order to Show Cause which, in summary, meant that he was illegally in this country (AR 83). Cheng also admitted having no relatives or family in this country (AR 89) and asked Judge Taffet to grant him the discretionary privilege of voluntary departure (AR 83), representing to the Judge that he was willing and financially able to depart promptly from the

country (AR 84).^{*} Based on Cheng's representations and pursuant to his discretionary power Judge Taffet granted Cheng's request (AR 91). However, Judge Taffet also entered an alternative order of deportation if Cheng failed to depart voluntarily on or before August 1, 1969. Apparently satisfied with the results of the hearing, Cheng waived his right to appeal Judge Taffet's decision to the Board of Immigration Appeals (AR 92).

Despite his representations to the Judge, Cheng failed to leave this country pursuant to Judge Taffet's decision of July 11, 1969. As a result, the Judge's alternative order of deportation went into effect, and a warrant of deportation was issued against Cheng by the Service's Newark Office (AR 80). Nevertheless, in defiance of the Judge's order, Cheng continued to live in this country and to work as a cook in violation of his expired non-immigrant status.^{**}

When Cheng resumed his unlawful employment he remained a deportable alien pursuant to Judge Taffet's alternative order. But from 1972 until 1976 the Service granted Cheng several stays of deportation to enable him to receive medical treatments. Throughout this period and despite the treatments Cheng was able to work continuously and, through his employer, to apply to the United States Department of Labor for a labor certification based on his unlawful employment (AR 58).^{***}

On May 26, 1976, the District Director denied Cheng's request for another extension of his departure time because any added medical treatment Cheng needed could be obtained in Hong Kong (AR 48). Consequently on June 1, 1976 the District Director notified Cheng to

^{*} 8 C.F.R. § 244.1.

^{**} 8 C.F.R. § 214.1(c).

^{***} See 29 C.F.R. § 60.2(c).

depart voluntarily from this country on or before June 8, 1976.

As he had in the past, Cheng also ignored this notification. Thus instead of departing from this country, he hired new counsel who moved to reopen his seven year old deportation proceedings for the purpose of applying for suspension of deportation under Section 244(a) of the Act. (AR 39 and 43).^{*} Although required by 8 C.F.R. § 242.22, Cheng failed to submit any material evidence to establish even a *prima facie* case for reopening. See *Matter of Sipus*, Interim Decision 2172 (B.I.A. 1972); *Matter of Lam*, Interim Decision 2136 (B.I.A. 1972). Rather he merely alleged that he had been present in the United States since February 1, 1969, he was of good moral character, and his deportation would result in extreme hardship to himself or his employer, who is not a close relative as described in Section 244(a)(1).^{**}

On July 20, 1976 an Immigration Judge denied Cheng's motion to reopen. (AR 33). In his opinion, the Judge concluded that Cheng had failed in his burden of

^{*} Section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1) provides that the Attorney General, through the Service, may suspend the deportation of an alien who, *inter alia*, has been "physically present in the United States for a continuous period of not less than seven years immediately preceding the date of [his] application, . . . and is a person whose deportation would . . . result in extreme hardship to the alien or to his spouse, parent or child, who is a citizen of the United States or lawfully admitted resident alien. . . . To be eligible for this relief, an alien has the burden of proving compliance with these provisions. *Rassano v. Immigration and Naturalization Service*, 492 F.2d 220 (7th Cir. 1974); *Ex parte Orlando*, 131 F. Supp. 485 (S.D.N.Y.) *aff'd*, 222 F.2d 537 (2d Cir.), *cert. denied*, 350 U.S. 862 (1954).

^{**} Attached to Cheng's motion were: (1) a copy of the order to show cause in his 1969 deportation hearing and a copy of a Selective Service registration card (AR 96-101); (2) a hospital admission form (AR 100); (3) an application for a New York City Good Conduct Certificate (AR 102); and (4) an affidavit from his employer describing his job (AR 73).

proof to demonstrate that he was *prima facie* eligible for suspension of deportation because he had only submitted "bare allegations", and "nebulous" allusions to the medical treatment which he claimed supported his contention of personal extreme hardship and because, at any rate, he had no immediate family in the United States (AR 34).

On August 4, 1976, Cheng appealed the Immigration Judge's decision to the Board of Immigration Appeals (AR 29). On September 9, 1976 the Board affirmed the decision of the Immigration Judge and dismissed the appeal (AR 28).

On November 1, 1976, as a result of the Board's actions, the Service issued a warrant for Cheng's deportation scheduled for November 22, 1976. Four days before he was to be deported, Cheng's attorney filed a motion to reconsider with the Board in which he urged it to reconsider its decision of September 9, 1976. As with his prior motion to reopen, Cheng failed to comply with 8 C.F.R. § 3.8 and did not submit any new facts or evidence to support his motion. Instead he made the naked claim that the Board's earlier decision had failed to address all of the issues raised by the appeal. In addition, Cheng requested a stay of deportation pending the Board's decision on his motion for reconsideration.

On November 23, 1976, the Board denied Cheng's request for a stay of deportation, concluding there was little likelihood it would grant his motion for reconsideration (AR 1)*. In response to the Board's action denying his request for a stay, Cheng raced to file a petition for review with this Court to block his deportation by means of the automatic statutory stay of deportation which accompanies the filing of a petition to review orders of deportation**.

* See *Hernandez v. Immigration and Naturalization Service*, 539 F.2d 384, 385 (5th Cir. 1976).

** Section 106(a)(3) of the Act, 8 U.S.C. § 1105a(a)(3).

Having circumvented the Board's denial of his request for a stay by instituting this action, Cheng was able to avoid deportation until January 19, 1977 when the Board rendered its decision denying his motion for reconsideration. In this decision the Board concluded that, even if the conclusory, unsupported contentions submitted by Cheng in support of his motion to reopen were true, Cheng still failed to make a *prima facie* showing of eligibility for suspension of deportation. The Board also concluded that Cheng had failed to establish the sufficiently strong extenuating circumstances he needed to justify its remanding his case to an Immigration Judge to enable him to apply for a new grant of voluntary departure.

As a result of the Board's January 19, 1977 decision and his prior institution of a review proceedings in this action, Cheng was able to request review of this decision from this Court. Cheng has since remained in the United States pursuant to the automatic statutory stay of deportation which accompanies a petition for review filed pursuant to Section 106(a) of the Act, 8 U.S.C. § 1105a(a).

Relevant Statutes

Immigration and Nationality Act, 63 Stat. 163 (1952)
as amended:

Section 106, 8 U.S.C. 1105(a)

(a) ¹⁷ The procedure prescribed by, and all the provisions of the Act of December 29, 1950, as amended (64 Stat. 1129; 68 Stat. 961; 5 U.S.C. 1031 et seq.), shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 242(b) of this Act or comparable provisions of any prior Act, except that— * * *

Section 244, 8 U.S.C. § 1254—

(a) As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien who applies to the Attorney General for suspension of deportation and—

(1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence;

* * * * *

(e) The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of Section 1251(a) of this title . . . to depart voluntarily from the United States at his own expense in lieu of deportation as such alien shall establish to the satisfaction of the Attorney General that he is, or has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection.

* * * * *

Relevant Regulations

Title 8, Code of Federal Regulations (C.F.R.) § 3.2

3.2 Reopening or reconsideration.

The Board may on its own motion reopen or reconsider any case in which it has rendered a decision. Reopening or reconsideration of any case in which a decision has been made by the Board, whether requested by the Commissioner or any other duly authorized officer of the Service, or by the party affected by the decision, shall be only upon written motion to the Board. Motions to reopen in deportation proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing . . .

3.3 Motion to reopen or motion to reconsider.

(a) Form. Motions to reopen and motions to reconsider shall be submitted in triplicate. A request for oral argument, if desired, shall be incorporated in the motion. The Board in its discretion may grant or deny oral argument. Motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits or other evidentiary material. Motions to reconsider shall state the reasons upon which the motion is based and shall be supported by such precedent decision as are pertinent . . .

§ 242.22 Reopening or reconsideration.

Except as otherwise provided in this section, a motion to reopen or reconsider shall be subject to the requirements of § 103.5 of this chapter. The special inquiry officer may upon his own motion, or upon motion of the trial attorney or the respondent, reopen or reconsider any case in which he had made a decision, unless jurisdiction in the case is vested in the Board under Part 3 of this

chapter. An order by the special inquiry officer granting a motion to reopen may be made on Form I-328. A motion to reopen will not be granted unless the special inquiry officer is satisfied that evidence sought to be offered is material and was not available and could not have been discovered or presented at the hearing; . . .

ARGUMENT

POINT I

This Court Lacks Subject Matter Jurisdiction To Consider The Board Of Immigration Appeals' Denial Of A Stay Of Deportation.

In his November 18, 1976 petition to this Court, Cheng ostensibly sought review of the Board's denial of his application for a stay of deportation under Section 106 of the Act. However, a cursory examination of the decisions interpreting this provision, which have held that a Court of Appeals lacks subject matter jurisdiction under Section 106 to review the denial of stays, reveals that the primary purpose for the premature institution of this action must have been to frustrate the Service's enforcement of a valid order of deportation against Cheng.

This Court has consistently held that the denial of an application for discretionary relief (i.e. stay of deportation), after deportation has been ordered, is not a final order of deportation pursuant to a deportation proceeding under Section 242(b) of the Act and thus is not reviewable by a Court of Appeals under section 106(a) of the Act, 8 U.S.C. § 1105(a). *Li Cheung v. Esperdy*, 377 F.2d 819, 820 (2d Cir. 1967); *Tai Mui v. Esperdy*, 371 F.2d 772, 775-777 (2d Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967).

The propriety of this Circuit's position in this regard was reaffirmed by the United States Supreme Court in *Cheng Fan Kwok v. Immigration and Naturalization Service*, 392 U.S. 206 (1968). In *Kwok* an alien was

seeking to review a District Director's denial of his request for a stay of deportation. The Third Circuit declined jurisdiction to review the denial of this discretionary relief and the United States Supreme Court granted certiorari because various Courts of Appeals had disagreed on whether such a denial was reviewable under section 106 of the Act. After exhaustively reviewing the legislative history behind § 106(a), the Court affirmed the Third Circuit's decision that the denial of an application for a stay made after a final order of deportation had been entered by an Immigration Judge was not reviewable under section 106 of the Act. In reaching this result the Court specifically restricted section 106's application "to orders entered during proceedings conducted under § 242(b), or directly challenging deportation orders themselves". *Id.* at 215. Since Cheng's application to the Board for a stay of deportation does not attack his deportation order and was made outside of his deportation proceedings under Section 242(b) the Court lacks jurisdiction, under *Kwok*, to review it.

This Circuit has recently applied the Supreme Court's conclusion in *Kwok* to deny jurisdiction to an alien seeking to extend the provisions of Section 106(a) to include the Service's denial of a visa petition that was "neither a final order of deportation nor made 'pursuant to' § 242(b) administrative proceedings". *Colato v. Immigration and Naturalization Service*, 531 F.2d 678, 679 (2d Cir. 1976). In reaching this result, clearly contemplated by the Act and mandated by the Supreme Court in *Kwok*, the Court in *Colato* examined the administrative procedure involved in the adjudication of a visa petition and concluded that it too was not "so intimately connected with a deportation proceeding that the two should be heard together in direct review by the Court of Appeals." *Id.* at 680.

A conclusion similar to that in *Kwok* was also reached by the Fifth Circuit in *Hernandez v. Immigration and Naturalization Service*, *supra*, when presented with a fact

pattern almost identical to that in this case. In *Hernandez*, the alien also filed a motion to reopen her deportation proceeding with an Immigration Judge, pursuant to 8 C.F.R. § 242.22, contending that a pending administrative petition, if approved, would make her eligible for an immigration visa. When this motion was denied, the alien then appealed to the Board of Immigration Appeals and requested a stay of deportation pending the Board's decision on the merits. As in this case, the Board denied the alien's request for a stay and the alien responded by filing a petition for review of this denial contending that the Court had jurisdiction to consider it under Section 106 of the Act. The Fifth Circuit disagreed and dismissed the petition for want of jurisdiction concluding:

"We agree with petitioner that the denial of a motion to reopen is reviewable in this court as a "final order of deportation." *Giova v. Rosenberg*, 379 U.S. 18, 85 S.Ct. 156, 13 L.Ed. 90 (1964). However, petitioner is not entitled to a review of that decision by this court until she has exhausted her administrative remedies. This failure to exhaust available administrative remedies results in a lack of jurisdiction in this court at this time. *Arias-Alonso v. Immigration and Naturalization Service*, 391 F.2d 400 (5th Cir. 1968); *Samala v. Immigration and Naturalization Service*, 336 F.2d 7 (5th Cir. 1964).

Petitioner's contention that her administrative remedies were "unavailable, inadequate, or improbable" is unpersuasive. First, the timing of the proceedings below were, for the most part, at the instance of the petitioner. Secondly, we agree with the district director that petitioner's presence in this country is not required for the adjudication of this matter." *Id.* at 386.

Cheng's petition to this Court for review of the Board's denial of his application for a stay of deportation must similarly be denied for want of jurisdiction under Section 106(a) of the Act, 8 U.S.C. § 1105a(a). The discretionary relief he sought from the Board was neither a direct challenge to the valid outstanding deportation order of 1969 nor was it a request made during his deportation proceedings conducted under Section 242(b) of the Act, 8 U.S.C. 1252(b). In light of the applicable law and the coincidental timing of the filing of Cheng's petition for review with the Board's denial of his application for discretionary relief, this petition can only be regarded as a transparent attempt by Cheng to obtain the statutory stay of deportation which automatically accompanies the filing of such a petition. Should jurisdiction be accepted by this Court, it would mean that "all deportations could be permanently frustrated by the mere filing of successive motions to reopen", *Acevedo v. Immigration and Naturalization Service*, 538 F.2d 918, 920 (2d Cir. 1976), since the alien would be guaranteed a stay of deportation while he pursued various dilatory and frivolous administrative remedies. This Court should not allow its processes to be so abused and should dismiss this petition.

POINT II

The Board of Immigration Appeals' Denial Of Petitioner's Motion To Reconsider Was A Proper Exercise Of Discretion.

As we demonstrated in Point I, *supra*, Cheng's petition for review submitted to this Court on November 23, 1976 was filed solely to obtain a statutory stay of deportation pending the decision on his motion for reconsideration. As a result, his bad faith in this regard mandates dismissal of his appeal. *Acevedo v. Immigration and Naturalization Service, supra*.

Notwithstanding this bad faith, Cheng also seeks review of the Board's subsequent decision denying his motion for reconsideration. (Petitioner's Brief, page 6). In that motion Cheng had sought to reopen his deportation hearing to apply for the extraordinary relief of suspension of deportation or, in the alternative, for reinstatement of voluntary departure.* The Board denied Cheng's motion because he failed to demonstrate a *prima facie* case of eligibility for suspension of deportation and because the record did not reflect the strong extenuating circumstances necessary to warrant the granting of voluntary departure anew. In this petition Cheng claims that the Board used erroneous standards in determining whether a *prima facie* case was established and failed to apply an established standard in determining whether he should be granted voluntary departure anew. A brief examination of the Board's discretionary powers and the record of this case will demonstrate the legal and factual propriety of the Board's decision.

A. The Granting Of A Motion To Reconsider A Board's Prior Decision Is A Matter Of Discretion.

The Immigration and Nationality Act contains no specific provisions for the reopening of a deportation proceeding. The Attorney General, under his broad grant of authority to administer and enforce the Act,** has promulgated regulations which permit reopening or reconsideration of prior decisions as a matter of discretion

* Cheng's purpose for seeking a new voluntary departure date was to enable him to re-enter this country after he obtained a sixth preference immigrant visa from Hong Kong. Having refused to abide by the departure dates set by the Immigration Judge and the District Director; Cheng's proper avenue of relief is to depart and apply for permission to re-enter. See 8 C.F.R. § 212.2.

** Section 103(a) of the Act, 8 U.S.C. § 1103(a).

provided certain criteria are met. The applicable regulation, 8 C.F.R. § 3.2, provides in pertinent part that motions to reopen or reconsider "shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered at the prior hearing." Additionally, 8 C.F.R. § 3.8 provides that "motions to reopen shall state the new facts to be proved at the reopened hearing and shall be supported by affidavits and other evidentiary material." See also 8 C.F.R. § 242.22.

Obviously, the regulations contemplate that a motion to reopen or reconsider a prior decision shall contain an offer of evidence, that the evidence offered shall have been heretofore unobtainable, and that the evidence if accepted would be sufficient to warrant the granting of the relief sought. Accordingly, the Board is required to evaluate any such offer of evidence against the background of the record already compiled in the alien's case. When such evidence, even if accepted as true, would not justify a grant of the ultimate relief sought, it is obvious that no purpose would be served by reopening the proceeding. With this in mind, we now turn to examine the nature of the relief sought by this petitioner and the evidence he offered in support of his motion.

B. Suspension Of Deportation.

Suspension of deportation pursuant to Section 244 (a) of the Act, 8 U.S.C. § 1254 (a), is the ultimate form of relief available to a deportable alien. An alien whose application is approved has his deportability cancelled and obtains status adjustment to that of a permanent resident without having to leave the United States. Authority to grant or deny this relief is vested within the sound discretion of the Attorney General. *Hintopoulos v. Shaughnessy*, 353 U.S. 72 (1957). Those applications which are approved by the Attorney General must be

referred to the Congress for final legislative approval. Section 244(c) of the Act, 8 U.S.C. § 1254(c); *McGrath v. Kristensen*, 340 U.S. 162 (1950).

In order to qualify for suspension of deportation, an alien must first satisfy certain objective requirements contained in the statute. He must establish that he has been physically present in the United States for at least seven consecutive years immediately preceding his application, and that he had been a person of good moral character during that period. He must also convince the Attorney General that his deportation would result in extreme hardship to himself or to a close relative who is a citizen or resident alien of this country.

The application for suspension of deportation has the burden of showing that he meets these prescribed conditions. 8 C.F.R. 242.17(d); *Kimm v. Rosenberg*, 363 U.S. 405 (1960), *rehearing denied*, 364 U.S. 854; *Brownell v. Cohen*, 250 F.2d 770 (D.C. Cir. 1957). If he fails to establish statutory eligibility, the application must be denied as a matter of law. Attainment of the statutory minimum, however, does not mean that relief will be automatically granted. The alien who satisfies the statutory requirements still has the burden of convincing the Attorney General that he merits the favorable exercise of discretion. *Hintopoulos v. Shaughnessy*, *supra*; *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966); *Ng v. Pilliod*, 279 F.2d 207 (7th Cir. 1960), *cert. denied*, 365 U.S. 860 (1961). Accordingly when making his motion to reopen or his motion to reconsider it was incumbent upon Cheng to offer evidence to show not only that he was statutorily eligible but that he merited the extraordinary relief he sought as a matter of discretion.

C. The Granting Of Voluntary Departure Anew Is A Matter Of Discretionary Relief.

The granting or denial of the privilege of voluntary departure is also within the broad discretion of the Attorney General or his delegates. *Strantzalis v. Immigration and Naturalization Service*, 465 F.2d 1016 (3d Cir. 1972); *United States ex rel. Bartsch v. Watkins*, 175 F.2d 245 (2d Cir. 1949). Furthermore, even if the alien carries his burden by meeting the statutory and regulatory prerequisites for a grant of voluntary departure, see 8 U.S.C. § 1254(e); 8 C.F.R. § 244.1, this merely establishes his eligibility for relief. Discretion must still be exercised and may properly result in a denial of the privilege. *Strantzalis v. Immigration and Naturalization Service*, *supra*; *Khalaj v. Immigration and Naturalization Service*, 361 F.2d 208 (7th Cir. 1966); *Fernandez-Gonzalez v. Immigration and Naturalization Service*, 347 F.2d 737 (7th Cir. 1965). See also *Hintopoulos v. Shaughnessy*, *supra* at 77 (1957). The privilege of voluntary departure is considered extraordinary discretionary relief, and will only be granted in meritorious cases. *Diric v. Immigration and Naturalization Service*, 400 F.2d 658 (9th Cir. 1968), *cert. denied*, 394 U.S. 1015 (1969). The absence of good faith, the use of dilatory tactics and the failure to depart within the initial period set by the Immigration Judge may in and of itself be a sufficient ground for the denial of additional discretionary relief. *Fan Wan Keung v. Immigration and Naturalization Service*, 434 F.2d 301 (2d Cir. 1970); *United States ex rel. Lee Poo Fen v. Esperdy*, 423 F.2d 6 (2d Cir. 1970); *Lam Tat Sin v. Esperdy*, 227 F. Supp. 482 (S.D. N.Y. 1964), *aff'd*, 334 F.2d 999 (2d Cir.), *cert. denied*, 379 U.S. 901 (1964).

The granting of voluntary departure *anew* is also within the broad discretion of the Attorney General or his delegates. *Matter of Yeung*, 13 I & N Dec. 538

(1970). In *Matter of Yeung*, the Board of Immigration Appeals concluded that both an Immigration Judge and the Board were empowered to grant this discretionary privilege after an alien has remained beyond the prior limit fixed for his voluntary departure. However, the Board was careful to limit such grants to those situations in which "strong extenuating circumstances" exist or "where it appears that the failure to depart was due to circumstances beyond the [alien's] control". *Id.* at 533. Moreover, the Board stated that, in exercising its discretion, the Immigration Judge and Board "must apprise the factors which led to the [alien's] delay" in departing and are entitled "to take into account the enforcement needs of the Service in light of the [alien's] changing circumstances". *Id.* at 534.

D. The Record In This Case Demonstrates That The Board Did Not Abuse Its Discretion In Declining To Grant Petitioner's Motion To Reconsider.

As discussed previously, the Board denied to reconsider its denial of Cheng's motion to reopen because Cheng had twice failed to demonstrate his *prima facie* eligibility for suspension of deportation and the necessary extenuating circumstances to warrant the granting of voluntary departure anew. In this action Cheng contends that the Board's decision should be reversed because the Board utilized improper standards in determining his eligibility for suspension of deportation and incorrectly applied its own standards in denying his request for voluntary departure. A review of the facts contained in Cheng's motion to reopen and relied upon by the Board's decision denying Cheng's motion to reconsider, demonstrate the propriety of the Board's discretionary decision denying the motion.

(1) Standard of Review

In reviewing an exercise of discretionary authority the scope of judicial review is extremely narrow. Accordingly it precludes this Court from substituting its judgment for that of the Board unless the determination is found to be without any rational explanation, to depart inexplicably from established practices, or rest on an impermissible basis. *Wong Wing Hang v. Immigration and Naturalization Service, supra*. It is against this standard that Cheng's claims must be examined to determine whether he met his burden of proof to show his eligibility for discretionary relief. *Rassano v. Immigration and Naturalization Service, supra; Ex parte Orlando, supra*.

(2) In the Absence of Any Supporting Evidence Cheng's Motion To Reopen Was Properly Denied.

Cheng alleged in his motion to reopen that he had accrued seven years of physical presence in the United States, that he had been a person of good moral character, and that his deportation would result in extreme hardship to himself. Although required by 8 C.F.R. § 242.22 he did not submit any material documentary evidence or supporting affidavits which detailed the facts upon which his claim of extreme hardship was based. Rather, he attempted to support this contention of hardship by alleging that his deportation to Hong Kong would result in extreme personal hardship because he would have to return to a country where he had no immediate relatives, and where he would be unable to obtain certain medical treatment, and because his presence was needed by his employer. The Board properly concluded that these allegations were insufficient for two reasons:

First, under 8 C.F.R. §§ 242.22, 3.2, 3.8, Cheng was required to make a *prima facie* offer of proof to support these allegations. See *matter of Sipus, supra*. Not only did he completely fail to make such an offer with respect to these allegations, but he also failed to introduce *any* material supporting evidentiary material to demonstrate that he merited the favorable exercise of discretionary relief. The Courts have continuously affirmed the Board's discretionary refusal to reopen deportation proceedings based upon a failure to comply with these regulations. Compare *Novinc v. Immigration and Naturalization Service*, 371 F.2d 272, 273 (2d Cir. 1967); *Luna-Benalcazar v. Immigration and Naturalization Service*, 414 F.2d 254, 256 (6th Cir. 1969); *Tupacyupanqui-Marin v. Immigration and Naturalization Service*, 447 F.2d 603, 607 (7th Cir. 1971). Therefore, Cheng's failure to comply with these regulations provided an independent and sufficient ground to deny both his motion to reopen and reconsider and therefore the Board's conclusion based on this ground was correct.

Second, even if Cheng's allegations had been true and had been properly supported by evidentiary material, the Board's conclusion that he still had not sufficiently demonstrated a *prima facie* case for reopening his proceedings was still correct. This conclusion was based on the Board's evaluation of the two naked allegations Cheng had relied upon to show extreme personal hardship.

Initially Cheng claimed that his medical needs warranted a finding of extreme hardship. However, as the Board concluded, this contention was refuted by the record. Thus, despite this "medical" problem, the record revealed that Cheng had continuously worked during the past six years and had requested his employer to apply for a labor certification on his behalf. Curiously Cheng's medical "problem" did not interfere when he sought immigration benefits. In this regard it should also be noted

that the only "proof" Cheng sought to offer regarding his medical hardship was a copy of a hospital admission form (AR 100). This document not only fails to verify his alleged appointment at the hospital but does not state either the reason for the appointment or the anticipated length of his stay. Moreover, as the Board correctly concluded, even if Cheng's allegations were correct, he still could obtain the treatments he required in Hong Kong. Surely the facts of this case do not constitute the type of extreme hardship contemplated by Section 244(a) of the Act, 8 U.S.C. 1254(a).

Cheng's second basis for claiming that his deportation would result in extreme hardship to himself was his allegation that he would lose his present job and lose the labor certification he had managed to obtain by delaying his deportation. However, as the Board properly concluded, this allegation, even if true, does not constitute a requisite showing of extreme hardship. This is so for several reasons.

First, Cheng's deportation would not preclude him from utilizing the procedure which all other prospective immigrants must use to gain entry to this country. Thus, if finally deported Cheng could still apply in Hong Kong for a preferential immigrant status based on his special skills. Second, despite Cheng's contentions to the contrary, it is clear that the Board examined Cheng's motion to reopen under the proper standard * to determine whether he had demonstrated such equities, in addition to mere economic hardship,** that his deportation would

* *Matter of Sangster* 11 I & N Dec. 309.

** It is clear that a mere showing of economic hardship is insufficient to warrant the discretionary relief of suspension of deportation. See *Pelaez v. Immigration and Naturalization Service*, 513 F.2d 303 (5th Cir. 1975); *Yong v. Immigration and Naturalization Service*, 459 F.2d 1004 (9th Cir. 1972).

result in an extreme personal hardship. Thus, despite his burden the record in this case is barren of any such evidence of outstanding equities. Moreover, given the number of motions Cheng has submitted and the length of time he has been in this country, he has had ample opportunity to develop and present such evidence if, in fact, any existed. His failure to do so again confirms the Board's conclusion.

Finally, the fact that Cheng may be eligible for an immigrant visa in the near future does not alter the propriety of the Board's decision. The Courts of this Circuit have consistently held that an alien has no right to prolong his deportation proceedings so that he can await his eligibility for an immigrant visa. See *Noel v. Chapman*, 568 F.2d 1023, 1029 (2d Cir.), cert. denied, 923 U.S. 824 (1975); *Bowes v. Immigration and Naturalization Service*, 443 F.2d 30, 31 (9th Cir. 1971); *United States ex rel. Lee Pao Fen v. Esperdy*, supra. If such were the law it would give aliens, like Cheng, who had acquired their entry into this country in an unlawful manner, an advantage over those aliens who had complied with the immigration laws and patiently awaited their visas. Surely such a result is not to be encouraged.

(3) The Board's Decision To Deny Cheng's Motion To Remand his Case to An Immigration Judge Was Proper.

In addition to his specious claim of eligibility for suspension of deportation, Cheng also sought to obtain a new grant of voluntary departure. Both the Immigration Judge and the Board denied Cheng's motion to reopen without deciding whether or not to reopen his hearing so that voluntary departure might be granted to him anew. In his motion for reconsideration of the Board's

denial, Cheng claimed that he should have been granted voluntary departure because, with his special skills and labor certification, he would not "frustrate the preponderant governmental interest in enforcing departure of those aliens who would adversely affect job conditions while awaiting visa issuance" (AR 16). The Board rejected Cheng's request for voluntary departure because he did not demonstrate sufficiently strong extenuating circumstances to warrant this relief. Cheng now claims that this conclusion is the product of an improper application of the Board's previous decision in *Matter of Yeung, supra*. This contention is unsupportable.

In *Matter of Yeung, supra*, the Board held that an Immigration Judge and the Board have the discretionary authority to grant anew the extraordinary relief of voluntary departure. However, the Board also held this relief could only be granted where "strong extenuating circumstances", were present which justified a new granting of voluntary departure. In determining whether these "strong extenuating circumstances" exist, the Board indicated that an evaluation of the factors which led to the delay in the alien's departure as well as the "enforcement needs of the Service" had to be made.

Cheng contends that his failure to depart on the final day of his voluntary departure (June 8, 1976) was due to circumstances out of his control and, as a result he has demonstrated the "strong extenuating circumstances" necessary to justify the granting of voluntary departure anew. However, he does not indicate what evidence in the record would lead the Board to that conclusion. In fact, the record is devoid of any facts that would support that conclusion or warrant such a finding.

Moreover, Cheng was granted extensions of his voluntary departure from 1972 to June 1976 based on his

medical "treatment". However, in June, 1976 the district director denied his last request for a further extension because any additional medical attention needed by Cheng could be acquired in Hong Kong. Cheng failed to depart within the time allotted. These facts combined with his previous history of failing to comply with other grants of voluntary departure, reflect his apparent intent to remain in this country until he could obtain a visa. Thus, under 8 C.F.R. § 244.1 Cheng is ineligible for voluntary departure and the Board's conclusion in this respect, that the record and facts surrounding Cheng's alleged delay in departing did not meet the standard established in *Matter of Yeung*, was correct.

CONCLUSION

The petition for review should be denied.

March 1977

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for Respondent.*

RICHARD J. LEON,
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Of Counsel.*

ADDENDUM



1a
Decision

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
Washington, D.C. 20530

JAN 19, 1977

[SEAL]

File: A16 027 125—New York

In re: YI CHUN CHENG

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:

Paul Rubin, Esquire
Three West 57th Street
New York, New York 10019

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251
(a)(2)—Nonimmigrant visitor—re-

mained longer than permitted

APPLICATION: Reconsideration

This is a motion to reconsider our decision of September 9, 1976 dismissing an appeal from a decision of an immigration judge dated July 20, 1976 denying a motion to reopen the deportation proceedings against the respondent. The respondent's motion will be denied.

The respondent is a 27-year-old native of China who entered the United States on February 1, 1969 at New York, New York in transit without visa. At a hearing held on July 11, 1969, the respondent was found deportable as an overstayed nonimmigrant and was granted the

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privilege of voluntary departure by the immigration judge to be effected not later than August 1, 1969. The respondent did not leave by the date initially authorized by the immigration judge. The record further shows that the respondent has been granted repeated extensions to depart voluntarily by the District Director, the last one expiring on June 8, 1976.

The respondent's original motion to the immigration judge for reopening was filed so as to allow him to file for suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act and obtain a new grant of voluntary departure from the immigration judge. The motion to reconsider now before us is directed to obtain a reopening of the proceedings for the same purposes.

The respondent has not made a *prima facie* showing of eligibility for suspension of deportation. Although the respondent has accumulated seven years of physical presence in the United States, he has failed to show that his deportation would result in extreme hardship to himself or to the relatives designated in section 244(a) of the Act.

No affidavits or other documentary evidence has been submitted detailing the facts upon which the claim of extreme hardship is based. Conclusionary statements without evidentiary or factual support are not sufficient to obtain reopening. See *Matter of Lam*, 14 I&N Dec. 98 (BIA 1972). However, even if we were to accept the statements of counsel in his brief as equivalent of the factual or evidentiary support which must accompany motions of this nature, we are not satisfied that a *prima facie* case has been made for reopening the proceedings.

Counsel avers that the respondent's medical problems warrant a finding of extreme hardship. However, the

Decision

evidence in the record seems to indicate that the respondent's medical condition is not to impair his general ability to function normally.

That the respondent's deportation would mean the loss of the job offer that sustains his approved labor certification which would mean his inability to enter as a nonpreference immigrant or as a sixth preference immigrant, if a visa petition is approved, cannot be considered extreme hardship, even if we discount the speculative nature of this assertion.

Any alien's enforced departure from the United States entails hardship. In the cases where all the hardship is ascribable solely to the adjustment necessary in any change of residence, a finding of extreme hardship is generally found unwarranted. That the respondent might lose the job offer does not preclude the respondent from ever entering the United States or from making a living abroad. If he lost the job offer, he would be in the same position as any other prospective nonpreference immigrant at the initial stage.

We reject counsel's contention that we should recede from our interpretation of 8 C.F.R. 244.1 as enunciated in *Matter of Yeung*, 13 I&N Dec. 528 (BIA 1970).

We are not persuaded that a remand is appropriate to consider a new grant of voluntary departure to the respondent. The respondent was granted voluntary departure initially by an immigration judge on July 11, 1969. The respondent has been granted repeated extensions by the District Director up to June 8, 1976. The record does not reflect such strong extenuating circumstances as would justify a new grant of voluntary departure by an immigration judge. Accordingly, the respondent's motion will be denied.

ORDER: The motion is denied.

Chairman

AFFIDAVIT OF MAILING

State of New York)
County of New York) ss

CA 76-4257

Thomas H. Belote being duly sworn,
deposes and says that he is employed in the Office of the
United States Attorney for the Southern District of New York.

That on the
two copies

17th day of March 19 77 he served ~~a copy~~ ^{two copies} of the
within Brief and Addendum for Respondent

by placing the same in a properly postpaid franked envelope addressed:

Paul Rubin
3 West 57th Street
New York, New York 10019

And deponent further says he sealed the said envelope and placed the same in the mail ~~office~~ drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

Thomas A. Bell

18th day of March, 19 77

Joseph Lee

RALPH L. LEE
Notary Public, State of New York
No. 41-2292833 Queens County
Term Expires March 30, 1977